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SJC-12197

FREDERICK PINNEY vs. COMMONWEALTH.

February 15, 2018.

Homicide. Constitutional Law, Double jeopardy. Practice, Criminal, Mistrial, Double jeopardy.

Frederick Pinney is charged with murder in the first degree. After his first trial ended in a mistrial, he moved to dismiss the indictment on the basis that the evidence presented was legally insufficient to warrant a conviction, and therefore retrying him would violate the guarantee against double jeopardy. The trial judge denied the motion, and Pinney then filed a petition pursuant to G. L. c. 211, § 3, in the county court, seeking review of that decision. A single justice denied the petition, and Pinney appeals. We affirm.

Background. Pinney was indicted in 2014 for the murder of Tayclair Moore. His trial commenced in January, 2016, and lasted several days. At the close of the Commonwealth's case, Pinney moved for a required finding of not guilty, which the trial judge denied. He renewed the motion orally later that day at the close of all the evidence; the judge took no action on the motion at that time. Pinney renewed the motion again, in writing, several days later while the jury were deliberating; again the judge took no immediate action.

After deliberating for several days, the jury reported to the judge that they were deadlocked, leading the judge to give them, the following day, an instruction pursuant to Commonwealth v. Rodriguez, 364 Mass. 87, 101-102 (1973) (Appendix A), and Commonwealth v. Tuey, 8 Cush. 1, 2-3 (1851). Later that day, the foreperson informed the judge that one of the deliberating jurors had discussed the deliberations with the alternate

jurors. The judge conducted an individual voir dire of the jurors, determined that the deliberating and alternate jurors had improperly communicated, and concluded that the jurors had engaged in misconduct. On this basis, Pinney filed a motion for a mistrial that the judge allowed. The judge later denied Pinney's renewed motion for a required finding of not guilty. Pinney subsequently filed a motion to dismiss the indictment, claiming that the evidence was insufficient to warrant a guilty verdict and that double jeopardy principles thus barred any retrial. The trial judge denied that motion as well.

Discussion. In certain circumstances, allowing a retrial of a defendant whose first trial has ended in a mistrial would infringe on the defendant's double jeopardy right not to be tried twice for the same offense. One such circumstance is where the evidence at the first trial was legally insufficient to warrant a conviction. See Choy v. Commonwealth, 456 Mass. 146, 149-150, cert. denied, 562 U.S. 986 (2010); Neverson v. Commonwealth, 406 Mass. 174, 175-176 (1989). See also Commonwealth v. Scott, 472 Mass. 815, 818 & n.5 (2015). "After a mistrial, the Commonwealth may retry a defendant [only] if it has presented evidence at the first trial that, if viewed in the light most favorable to the Commonwealth, would be sufficient for a rational trier of fact to find the defendant guilty of the crime charged beyond a reasonable doubt." Brangan v. Commonwealth, 478 Mass. 361, 363 (2017), citing Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979). The issue here, then, is whether the evidence presented to the jury was legally sufficient to support a guilty verdict on the charge of murder. We conclude that it was.

Based on the extensive evidence presented to the jury, considered in the light most favorable to the Commonwealth, the jury could have found the following. The day before the victim's death, Pinney, his roommate Christopher Podgurski, and the victim, Podgurski's girlfriend, were together in Holyoke, where all three of them consumed illegal drugs. Pinney and the victim eventually returned to the home that he and Podgurski shared in Springfield. Podgurski, meanwhile, stayed in Holyoke -- he went to a bar and to a friend's house and then went to his mother's house to stay the night. At 4:26 A.M. he received a text message from Pinney saying that the victim was "fucked up." He also received an unrelated telephone call from a friend at around the same time, on his mother's home telephone. The friend testified that Podgurski was sleepy and sounded "hammered" when they spoke on the telephone.

Podgurski woke up at his mother's house at approximately 10:15 A.M. He called the victim, but she did not answer her telephone. He then drove to his home in Springfield to look for her and, upon arriving there, found her cellular telephone and glasses in the bedroom that they shared. He could not, however, find the victim. Podgurski knocked on Pinney's bedroom door and asked about the victim. Pinney responded (without opening the door) that she had gotten angry and "left." He eventually opened the door just enough to exit the room and then closed and locked the door behind him. Podgurski told Pinney that he wanted to see inside the room; Pinney agreed, went downstairs to get a key to the bedroom door, and returned with the key and a butcher knife. After Pinney unlocked the door, Podgurski glimpsed the victim's unclothed legs on the floor. Because Pinney was armed with a butcher knife, Podgurski pretended not to see the victim. He then left the house, parked his motor vehicle in the driveway blocking Pinney's truck, and telephoned 911.

When the police arrived, they found Podgurski outside. They entered the home and observed blood on the kitchen floor and knives on the countertop. Pinney was in the kitchen at the time.¹ The police forced open the locked door to Pinney's bedroom and found the victim on the floor, unclothed and unresponsive. She had ligature marks on her neck and a bloody nose. A paramedic determined that she had no pulse and was not breathing, and that her pupils were fixed. She was cool to the touch, and her jaw and upper and lower extremity joints were stiff, indicating rigor mortis.

Items collected at the scene were tested for deoxyribonucleic acid (DNA), and the results of the tests were presented at trial. Among other things, swabs of red-brown stains taken from the victim's chest indicated the presence of Pinney's blood. Other DNA belonging to Pinney and the victim was recovered from the house, including from the kitchen, stairs, and bathroom. A DNA profile from an electrical cord taken from Pinney's bedroom matched Podgurski, and Podgurski

¹ The Commonwealth states that, in a videotaped interview at the police station later that day, Pinney told the police that at some point during the prior evening, he decided to kill himself and cut his arms and neck; that he then passed out; and that he had no memory of what happened afterward. Portions of the interview were played for the jury, and a recording of the interview was entered in evidence. The interview was not transcribed.

could not be excluded from a partial DNA profile from the victim's fingernail scrapings. The forensic pathologist who conducted the autopsy testified that the victim died as a result of asphyxia by ligature strangulation by another. She further testified that the victim's death was not caused by the presence of narcotics in her body or by manual strangulation. Additionally, the certificate of death indicated that the time of death was unknown.

Pinney and the Commonwealth agree that the primary contested issue at trial was the identity of the perpetrator. Pinney argues that the evidence suggests that Podgurski killed the victim. He points to evidence that Podgurski and the victim had been together for ten years, during which time the victim had obtained numerous abuse prevention orders against Podgurski. Additionally, there was evidence that Podgurski had been convicted of assault and battery on the victim, admitted that he had beaten and strangled her on a prior occasion, and had gone to a batterer's class. The victim herself suffered from a variety of drug addictions and had sought treatment.

Pinney also points to toxicology evidence indicating that the victim had several different illegal substances in her system when she died, including marijuana. He suggests that there was some evidence that she had ingested the marijuana shortly before she died. Because there was no evidence presented that any marijuana or marijuana "detritus" was found in the home after it was searched following the discovery of the victim's body, he argues that someone other than him must have provided the marijuana. He then suggests that it was Podgurski, highlighting the fact that Podgurski had, by his own admission, smoked marijuana when he returned home that day after he could not initially locate the victim and before he saw her body on Pinney's bedroom floor. In Pinney's view, because the precise time of death was unknown, it was possible that Podgurski not only provided the victim with marijuana that morning, but was also the one who killed her.

As stated, we are concerned here only with the legal sufficiency of the evidence to warrant a conviction of murder, and because the central contested issue is the identity of the victim's assailant, we are especially concerned with the sufficiency of the evidence to warrant a finding that Pinney was the one who murdered her. The principles we apply are well-settled:

"Under the familiar Latimore standard, the evidence is sufficient to reach the jury and a motion for a required finding of not guilty is properly denied if the evidence, viewed in the light most favorable to the Commonwealth and drawing all inferences in favor of the Commonwealth, would permit a rational jury to find each essential element of the crime beyond a reasonable doubt. [Latimore, 378 Mass. at 676-677]. In considering whether the jury could find the existence of each element of the crime charged, we do not weigh the supporting evidence against the conflicting evidence. Commonwealth v. Lao, 443 Mass. 770, 779 (2005). While the inferences drawn must be reasonable, they 'need not be necessary or inescapable.' Commonwealth v. Grandison, 433 Mass. 135, 140-141 (2001), quoting Commonwealth v. Lodge, 431 Mass. 461, 465 (2000). That evidence is conflicting does not demand a required finding of not guilty. See Koonce v. Commonwealth, 412 Mass. 71, 75 (1992). The jury are free to believe or disbelieve any or all of the evidence they hear. Id. However, evidence is not sufficient if it requires piling 'inference upon inference,' or requires 'conjecture and speculation.' Corson v. Commonwealth, [428 Mass. 193, 197 (1998)]."

Commonwealth v. Merry, 453 Mass. 653, 660-661 (2009).

Although Pinney raises reasonable points about, among other things, Podgurski's apparently troubled relationship with the victim, the marijuana in the victim's system at the time of her death, and the fact that the exact time of death is unknown, these concern the weight of the evidence, not its legal sufficiency. He is free to argue these points to the jury, and to try to persuade them that Podgurski was the one who killed the victim. The Commonwealth is not required "to prove that no one other than the accused could have performed the act." Commonwealth v. Merola, 405 Mass. 529, 533 (1989), quoting Commonwealth v. Casale, 381 Mass. 167, 175 (1980). That someone other than the defendant might have had the opportunity to commit the crime goes to the weight of the evidence, and that is a matter for a jury. See Casale, 381 Mass. at 175-176. For present purposes, we are satisfied that the evidence viewed most favorably to the Commonwealth, together with the permissible inferences, was more than sufficient to permit the jury to conclude that Pinney killed the victim.

The pathologist's stated cause of death was asphyxia by ligature strangulation by another. Based on the state of the victim's body at the time the paramedic first examined her, the

paramedic's testimony regarding rigor mortis, and evidence that Podgurski had spent the previous night and the first part of that morning in Holyoke, a jury could rationally conclude that the victim was killed before Podgurski arrived home, i.e., at a time when only Pinney was with her. A jury also could rationally conclude, on the basis of the suspicious circumstances and Pinney's highly suspicious behavior in the aftermath of the killing -- the location of the victim's lifeless, unclothed body on the floor of his locked bedroom; his falsely telling Podgurski, when asked the victim's whereabouts, that she had gotten angry and left; his locking the bedroom door as soon as he left the room, and then arming himself with a butcher knife before returning to unlock the door -- that it was Pinney who killed her.

Because the evidence was legally sufficient to support a murder verdict against Pinney, retrying him will not violate his protection against double jeopardy. The single justice therefore did not err in denying relief pursuant to G. L. c. 211, § 3.

Judgment affirmed.

John M. Thompson (Linda J. Thompson also present) for the petitioner.

Bethany C. Lynch, Assistant District Attorney, for the Commonwealth.